TABLE OF CONTENTS

Table of Contents, continued

TABLE OF AUTHORITIES

CASES:

Table of Authorities, continued Page

CASES continued

CONSTITUTION & STATUTES:

Table of Authorities, continued Page

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1970

No. 769

WINFIELD DUNN, *ET AL.*,
Appellants,
v.
JAMES F. BLUMSTEIN,
Appellee.

ON APPEAL FROM THE DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE

BRIEF FOR COMMON CAUSE, AMICUS CURIAE

Amicus submits this brief in support of the Appellee, James F. Blumstein. All parties have consented to its filing by a letter which has been presented to the Clerk of the Court pursuant to Rule 42(2).

INTEREST OF AMICUS

Common Cause is a national organization with over 100,000 dues-paying members which strives to promote citizen control of government. To this end it engages in public education, lobbying, litigation and other lawful means for influencing governmental institutions.

Common Cause has launched a national effort to expand voting rights by removing impediments to voting in state and federal election laws. One of the most important of these impediments is the lengthy residence requirement now

required by many states, including Tennessee. In each election these laws disenfranchise millions of citizens who have recently moved to a new residence.

Common Cause seeks the removal of these and other barriers to voting. Its interest is not limited to the interest of each voter in exercising the right which is preservative of all rights, important as that is, but extends to the interest of all citizens in the legitimacy of the democratic process. Legitimacy—acceptance—is achieved only when all have the ability to participate, when none are unjustly excluded from the processes of government.

SUMMARY OF ARGUMENT

The District Court focused upon the fundamental importance of the right to vote in holding that Tennessee's durational residency requirements violate the Equal Protection Clause. To offer the Court an additional perspective, this brief will argue that the challenged statutes unconstitutionally penalize exercise of the right to travel.

The decisive question on this score is whether the reasoning of *Shapiro v. Thompson*, 394 U.S. 618 (1969), points the way to the proper outcome here. That case involved waiting periods for welfare benefits. There is no difference here in the directness of the penalty resulting from exercise of the right to travel. The only possible distinction would rest on the theory that disenfranchisement discourages travel less than a denial of welfare benefits.

But *Shapiro* did not rely on any demonstrable deterrent effect. Nor do the cases developing the "chilling effect" doctrine support the argument that deterrence is necessary in order for a constitutional right to be violated. And before *Shapiro*, the Court repeatedly struck down discriminations based on travel or residence without considering the deterrence issue—frequently in circumstances where any true deterrent effect was clearly absent.

Consequently, the "compelling state interest" test of *Shapiro* should apply here. When this standard, or for that matter any test more substantial than the attenuated "rational basis" test, is applied to the Tennessee laws, they must be found unconstitutional.

There are two permissible State interests asserted to justify Tennessee's waiting periods for voting—preventing fraud, and insuring that voters are familiar with the candidates and issues. The first goal is best achieved by voter registration systems; waiting periods add little or nothing to their operation or enforcement. The Tennessee legislature and most others have recognized that 30 days is an adequate time to carry out registration procedures. As for the second state interest, waiting periods longer than the same 30-day period are unnecessary to insure knowledgeable exercise of the franchise. The pace of modern political campaigns is such that the new resident may easily become familiar with the candidates and issues during the month before an election.

ARGUMENT

I. Lengthy Residence Requirements for Voting Penalize Exercise of the Right To Travel, and Accordingly Must Meet a Strict Test of Constitutionality

This case does not involve the right of a state to insist that voters in its elections be bona fide residents. That power this Court has often recognized.[1] The complaint challenges

---

[1] *Evans v. Cornman*, 398 U.S. 419, 422 (1970); *Kramer v. Union Free School Dist.*, 395 U.S. 621, 625 (1969); *Lassiter v. Northampton County Bd. of Elections*, 360 U.S. 45, 51 (1959). The Court did approve a one-year residence requirement in *Pope v. Williams*, 193 U.S. 621, 633 (1904), and in 1965 affirmed per curiam a District Court decision approving the same one year requirement as it applied to presidential elections. *Drueding v. Davis*, 380 U.S. 125 (1965), *aff'g* 234 F. Supp. 721 (D.Md. 1964). Neither decision focused upon the right to travel. This brief argues that the holdings of *Pope* and *Drueding* should be overruled on the basis of *Shapiro v. United States*, 394 U.S. 618 (1969).

rather the right of Tennessee to insist that would-be voters, in addition to *being* residents, must *have been* residents for one full year.[2]

Requirements of this length penalize those persons, and only those persons, who have traveled from one state to another to establish a new residence during the qualifying period. The right exercised is constitutional. The penalty exacted, disenfranchisement, strikes at what this Court has many times termed a "fundamental right." *E.g., Evans v. Cornman*, 398 U.S. 419, 422 (1970); *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964). Consequently, there are two obvious avenues of approach to the task of judicial review.

The District Court focused upon the right to vote, and held that the Tennessee durational residency requirements violate the Equal Protection Clause. The appellee will no doubt support this reasoning.

This brief, to offer the Court an additional perspective, will argue that the Tennessee statute and others like it[3] unconstitutionally abridge the right to travel.

---

[2] The Tennessee statutes and constitution require both one year of residence in the state and three months' residence in the county in order to register and vote. TENN. CONST. art. IV § 1; TENN. CODE ANN. § § 2-201, 304. For convenience of reference—and because it is the more egregious requirement—this brief will normally address only the one year requirement. The same arguments apply to the three-month requirement, with two distinctions: (1) the latter requirement is, of course, shorter, but (2) the asserted state interest of insuring knowledgeable exercise of the franchise does not apply to citizens resident in Tennessee for more than one year who have moved to a new county within three months of an election insofar as balloting for statewide offices is involved.

[3] Thirty-three of the 50 states required one year or more of residence to vote in 1968; of the remaining states, 15 required six months. Two states had a three-month or 90-day requirement. *See* Macleod & Wilberding, *State Voting Residency Requirements & Civil Rights*, 38 GEO. WASH. L.REV. 93, 96-97 (1969). Since 1968 eight states formerly requiring a year's residence have shortened their requirement to six months or 180 days (Illinois, Maryland, Massachusetts, Ohio, South Carolina, South Dakota, Utah, Virginia), while one state has shortened its requirement from one year to three months (Colorado). The foregoing data, which include changes through the end of 1970,

[Continued]

The right to travel and right to vote issues are entitled to be treated together, of course, as the District Court briefly noted. *See* Appendix at p. 46. The traveler is the victim of a Hobson's choice when he must forfeit his right to vote because he wishes to exercise his right to travel. *Cf. Aptheker v. Secretary of State*, 378 U.S. 500, 507-08 (1964); *see also Developments in the Law—Equal Protection*, 82 HARV. L.REV. 1065, 1120-21 (1969).

Nevertheless, our analysis will not rely upon this synergism. The argument will focus exclusively upon the right to travel, with the assumption *arguendo* that the States have plenary power to regulate the franchise in their elections, free from any special scrutiny under the Equal Protection Clause because the right to vote is at stake.

A. Shapiro v. Thompson Requires a Strict Test of Review for Laws that Penalize Exercise of the Right To Travel.

The decisive question here is what test of review is appropriate for the Tennessee voting laws challenged. Recent decisions dealing with state welfare laws set forth the two most obvious alternative standards, and demonstrate that the choice between the two tests is critically important in determining the result of a case such as this.

Shapiro v. Thompson, 394 U.S. 618 (1969), involved welfare laws in Connecticut, Pennsylvania and the District of Columbia which required otherwise eligible persons to reside in their jurisdictions for one year before applying for benefits. Analyzing the case under the Equal Protection Clause,

---

[Footnote 2, continued]
were compiled from a survey which Common Cause conducted among all state voting officials and subsequent follow-up investigations; because of the recentness of several of the statutory changes, it has not been possible to confirm all current data by specific citation. But, assuming the accuracy of the Common Cause survey, the present structure of residence requirements would be a one year requirement in 24 states; a six-month or 180-day requirement in 23 states; and a three-month or 90-day requirement in 3 states.

the Court held that because the "appellees were exercising a constitutional right" in establishing a new residence, the statutes' "constitutionality must be judged by the . . . standard of whether it promotes a *compelling* state interest." *Id.* at 634, 638 (emphasis in original). Applying this exacting standard, the Court found that each asserted state interest was impermissible, unessential or achievable by "less drastic means" than a one-year waiting period, and consequently struck down the laws.

Dandridge v. Williams, 397 U.S. 471 (1970), applied quite the opposite test to a case challenging Maryland's maximum welfare grant regulation, which in effect limits the number of children for which each family may receive benefits. Since the limitation threatened no accepted constitutional right but represented instead mere "regulation in the social and economic field," the Court concluded that "it is enough that the State's action be rationally based and free from invidious discrimination." *Id.* at 484, 487. *Shapiro* was distinguished on the ground that "by contrast, the Court [there] found state interference with the constitutionally protected freedom of interstate travel." *Id.* at 484 n.16; *see also Kramer v. Union Free School Dist.*, 395 U.S. 621, 639 (1969) (Stewart, J., dissenting). Having opted for the "rational basis" test, the Court unsurprisingly had little difficulty upholding the regulation.

As in *Shapiro*, the Tennessee residence requirements constitute state interference with the constitutionally protected right to travel. The penalty here is precisely as direct as that in *Shapiro*: the statutes in each area affect all persons, but only those persons, who have exercised their right to travel. Accordingly, the "compelling state interest" test of *Shapiro* should control.

It cannot be convincingly urged that the magnitude of the deprivation is smaller in this case than in *Shapiro*. The loss of welfare benefits may hurt the poor more than loss of the vote. But far more interstate movers are affected

by voting laws than by welfare laws.[4] Virtually every traveler of sound mind and the required age will suffer from disenfranchisement; a much more limited number will be potential welfare recipients—and some of those persons will receive "interim assistance" from the government of their former residence. *See Shapiro*, 294 U.S. at 637. The sum of all the penalties exacted from movers as a group may thus well be greater in the case of voting than welfare laws.

B. The Argument that Disenfranchisement May Deter Travel Less than a Denial of Welfare Benefits Does Not Distinguish Shapiro from this Case.

Any argument that the reasoning of *Shapiro* does not apply here must rest on an assertion that disenfranchisement discourages exercise of the right to travel less than a denial of welfare benefits. Whether or not the facts support this distinction, it is constitutionally irrelevant. *Shapiro* did not rely upon the existence of any deterrent to exercise of the constitutional right. The majority spoke of "any classification which serves to *penalize* exercise of that right." *Id.* at 634 (emphasis added). The opinion did note the frank legislative purpose to deter migration by the poor and speculated that "an indigent who desires to migrate . . . will doubtless hesitate if he knows that he must risk" the loss of benefits.

---

[4] Estimates of the number of citizens disenfranchised by durational residence requirements vary substantially. The most reliable figures are those from the Census Bureau's biennial survey of voting characteristics, in which nonregistered persons are asked why they could not or did not register. The data for the 1966 elections show that 5,612,000 persons (plus or minus a sampling error of about 170,000) attributed their nonregistration to residence requirements. *Bureau of the Census, Current Population Reports* Series P-20, No. 174 at pp. 6-9, 34 (August 8, 1968). These figures are probably inflated in some measure by the tendency of the interviewees to offer a "socially acceptable" excuse for nonregistration. *See id.* at p. 4. The 1968 figures are not relevant here, since the Census survey was directed to registration for the presidential elections, which in many states entailed shorter waiting periods than for the state and local elections. Data for the 1970 nonpresidential elections will be available in approximately August, 1971.

Id. at 628-29. But the majority found no need to dispute the "evidence that few welfare recipients have in fact been deterred [from moving] by residence requirements." *Id.* at 650 (Warren, C.J., dissenting); *see also id.* at 671-72 (Harlan, J., dissenting).

Moreover, neither logic nor prior case law supports the contention that a constitutional right cannot be violated unless its exercise is deterred.

1. *The "Chilling Effect" Cases Do Not Reflect a View that Constitutional Rights Are Violated Only by Deterrence; They Demonsttate in Fact the Opposite.*

There are many cases which have considered the "chilling effect" a regulation may have on the exercise of a constitutional right.[5] These decisions stand for the proposition that *if* deterrence is present, *then* an actual violation of the right is not necessary to trigger review of a regulation. This is, however, quite a different matter from saying that if deterrence is *not* present, then there cannot be a violation of the right.

The "chilling effect" doctrine functions to justify invalidation of a statute "on its face" even if its specific application may not have violated the rights of the affected individual[6] or, in exceptional cases, even if a statute capable of both constitutional and unconstitutional applications has not yet

---

[5] *See, e.g., Brandenburg v. Ohio*, 395 U.S. 444 (1969); *United States v. Robel*, 389 U.S. 258 (1967); *Keyishian v. Board of Regents*, 385 U.S. 589 (1967); *see generally* Note, *The First Amendment Overbreadth Doctrine*, 83 HARV. L.REV. 844 (1970).

[6] Many of the cases invalidating overbroad or vague regulations because of their "chilling effect" have ignored the question whether the particular conduct involved could have been made the subject of a narrowly-drawn restraint. But the Court has on repeated occasions struck down regulations on their face despite findings or strong suggestions that no constitutional right had been violated because the conduct involved was properly subject to regulation in that case. *See, e.g., Aptheker v. Secretary of State*, 378 U.S. 500, 516-17 (1964); *Kunz v. New York*, 340 U.S. 290, 294-95 (1951); *Winters v. New York*, 333 U.S. 507, 512-20 (1948); *Thornhill v. Alabama*, 310 U.S. 88, 96 (1940).

been applied at all.[7] The purpose of the doctrine is to provide "breathing space" for constitutional rights by, in effect, anticipating possible violations and eliminating the "chilling effect" of that threat by striking down the regulation on its face.

These considerations are absent when each and every application of a statute penalizes exercise of a constitutional right. There is no need in such circumstances to anticipate violations of the right by considering its "chilling effect." Conversely, there is no justification for ignoring actual violations because there is no effect on exercise of the right. The "chilling effect" doctrine has previously served to broaden the protection accorded constitutional rights by allowing deterrence to substitute for an actual violation of the right in triggering review of a regulation. It would stand the doctrine on its head to hold that deterrence is a necessary element for the violation of a right, and thereby narrow its protection.

2. *This Court Has Previously Judged Discriminations Based on Travel or Residence by the Justification Asserted and Not Their Deterrent Effect.*

This Court's decisions before *Shapiro* dealing with classifications based on residence or travel show that the validity of the Tennessee statutes must turn on the adequacy of the justification for waiting periods to vote rather than the severity of their effect on exercise of the right. With rare exceptions, the Court has ignored the issue of deterrence; never has the Court relied on its presence or absence.

These earlier decisions based the right to travel upon various provisions of the Constitution—the Commerce Clause, Section 2 of Article IV, and the Privileges and Immunities Clause of the Fourteenth Amendment. More recent decisions

---

[7] *Compare Younger v. Harris*, 39 U.S.L.W. 4201 (February 23, 1971) *with Dombrowski v. Pfister*, 380 U.S. 479 (1965).

have found "no occasion to ascribe the right to a particular constitutional provision," *Shapiro*, 394 U.S. at 630; *see also United States v. Guest*, 383 U.S. 745, 759 (1966); *Oregon v. Mitchell*, 400 U.S. 112, 237-38 (opinion of Brennan, J.); *but cf. id.* at 285 (opinion of Stewart, J.).

There is no need here to consider whether any of the earlier decisions erred in attributing the right to a particular source. Nor is there any reason to decide whether a particular source—and therefore a particular line of cases—technically applies to the facts here.[8] The purpose of this discussion is simply to show that the deterrent effect, if any, of a penalty based on travel or residence has never played a central role in determining its constitutionality.

This Court first invalidated state statutes on right-to-travel grounds in the *Passenger Cases*, 7 How. (48 U.S.) 282 (1849).[9] New York and Massachusetts had enacted laws requiring ship captains to pay a tax of $1 to $2 for each passenger

---

[8] For example, Article IV does not apply when a state discriminates among its own citizens, *Colgate v. Harvey*, 296 U.S. 404, 428 (1935); *Bradwell v. Illinois*, 16 Wall. (83 U.S.) 130, 138 (1873). Hence, this provision would not apply to Tennessee's three-month county residence requirement if the new resident previously lived elsewhere in the state. It should, on the other hand, apply to the one-year state residence requirement—the State can scarcely be allowed to deny the new resident voting membership in its community but label him its own citizen to evade Article IV. And the reasoning of the Article IV cases should apply to both the three-month and one-year residence requirements insofar as those decisions illuminate the question of what constitutes unconstitutional discrimination.

[9] Justice Washington had earlier recognized "the right . . . to pass through or reside in any other state" as a privilege of state citizenship protected by Article IV in *Corfield v. Coryell*, 6 F. Cas. 546, 552 (No. 3230) (C.C.E.D. Pa. 1825), but upheld the power of New Jersey to bar nonresidents from its oysterbeds under a property ownership theory. Numerous other cases have, of course, recognized the right-to travel in dicta, *e.g.*, *Twining v. New Jersey*, 211 U.S. 78, 97 (1908), or invalidated state laws which directly prohibited travel, *e.g.*, *Edwards v. California*, 314 U.S. 160 (1941). This discussion will be limited to cases which have dealt with the question of what regulations short of flat prohibition may be considered to "penalize" the right to travel.

arriving from a foreign port. Both states attempted to justify their laws as health measures.

The majority of the Justices found each statute an unconstitutional regulation of commerce. Chief Justice Taney dissented. But in doing so he emphasized that his approval of the taxes levied on passengers from foreign ports would not extend to a smaller tax of only 25 cents which New York imposed for coasting-vessel passengers from other states. He condemned that provision, not then before the Court, as violative of the essential character of national citizenship, in words that have often since been quoted:

> "For all the great purposes for which the federal government was formed, we are one people, with one common country. We are all citizens of the United States; and, as members of the same community, must have the right to pass and repass through every part of it without interruption, as freely as in our own States."

Id. at 492 (Taney, C.J., dissenting).

The majority left equally little doubt that they too would condemn New York's tax on interstate travel. *See id.* at 406 (opinion of McLean, J.); *id.* at 461 (opinion of Grier, J.).

Most important, none of the Justices considered relevant, let alone controlling, the fact that a tax of 25 cents would scarcely deter interstate travel, nor would a tax of one or two dollars affect anyone's decision to cross the Atlantic.

In *Crandall v. Nevada*, 6 Wall. (73 U.S.) 35 (1868), the Court relied squarely on the rights of national citizenship in dealing with a tax which Nevada imposed on every person leaving the State by commercial carrier. The tax was only $1, certainly a minimal deterrent to travel. The Court, however, relying on Chief Justice Marshall's famous dictum in *McCulloch v. Maryland*, 4 Wheaton (17 U.S.) 316, 429 (1819), reasoned that "if the State can tax a railroad passenger one dollar, it can tax him one thousand dollars," 73 U.S. at 46. Accordingly, it found the tax unconstitutional.

Three years later, the Court turned to Section 2 of Article IV to strike down a Maryland statute which required non-

resident traders to pay a license fee of $300 in *Ward v. Maryland*, 12 Wall. (79 U.S.) 418 (1871). The tax was more substantial than in *Crandall*, but the Court focused only upon the vice of unconstitutional discrimination, without anywhere considering the law's effect, if any, on trade or tradesmen's choice of residence.

Williams v. Fears, 179 U.S. 270 (1900), is an anomalous decision. The Court there sustained a Georgia tax on employers hiring laborers for work outside the state. While recognizing that freedom of mobility "is a right secured by the Fourteenth Amendment and by other provisions of the Constitution," the majority concluded that if the act in question "can be said to affect the freedom of egress from the State, . . . it is only incidentally and remotely." *Id.* at 274.

The apparent retreat from earlier decisions was only momentary, however. *Williams* sank without a ripple. *Chalker v. Birmingham & N.W. Ry.*, 249 U.S. 522, 527 (1919), held that a $100 tax on out-of-state construction companies "materially abridge[d] . . . the equality of commercial privileges" secured by Article IV, again, as in *Ward*, without considering the statute's effect, if any, on any businessman's decision whether to operate or where to locate a construction company.

Travis v. Yale & Towne Mfg. Co., 252 U.S. 60, 79-80 (1920), held that New York could not deny nonresidents the same personal exemptions from the state income tax allowed residents of New York. The amounts involved were small and certainly insufficient to influence any New York employee's choice of residence—about $24 for a family of four with an income of $10,000, as can be calculated from the decision below, *see* 262 F. 576, 577 (2d Cir. 1919).

The Court again relied upon Article IV to invalidate a South Carolina statute which imposed a $2,500 license fee on nonresident shrimp fishermen in *Toomer v. Witsell*, 334 U.S. 385 (1948). Because the license fee in *Toomer* was so large, the Court noted that "the discrimination is so great

that its practical effect is virtually exclusionary." *Id.* at 396-97 & n.28. But the decision four years later in *Mullaney v. Anderson*, 342 U.S. 415 (1952), shows that the deterrent impact of the fee in *Toomer* was not essential to the decision. *Mullaney* involved an Alaskan territorial law that imposed a fee of only $50 on nonresident commercial fishermen. This represented only about one to three percent of the average net income for various types of fishermen, *see* 191 F.2d 123, 125 (9th Cir. 1951). The Court nevertheless found *Toomer* controlling and invalidated the Alaskan law.

C. If the Compelling State Interest Test Is Not Appropriate Here, the State Still Must Show More than a Mere "Rational Basis" for Its Discrimination Against Travelers.

The case law shows that this Court has never adopted the position that the constitutional right to travel and freely choose one's residence cannot be violated unless its exercise is demonstrably deterred. Indeed, quite the opposite is true.

Therefore, the reasoning of *Shapiro* should apply here: the Tennessee statutes must be shown "necessary to promote a *compelling* governmental interest" achievable by no "less drastic means." 394 U.S. at 634, 637. *Shapiro* represents a contemporary, comprehensive analysis of the constitutionality of classifications penalizing the right to travel; there is no reason to retreat from its test.

But if the Court should conclude, for whatever reason, that the stringent requirements of *Shapiro* must be tempered, there is no need or justification to adopt the polar extreme of the "rational basis" test. There is ample room between the two tests for a more flexible accommodation of whatever considerations may impel the Court.

In deciding how strict a constitutional standard is appropriate, the accuracy with which a regulation must achieve its goal is perhaps the most important variable. Two frequently employed grounds for invalidating restraints upon

constitutional rights have been the regulation's failure to achieve a permissible state interest with the necessary precision or the availability of a less restrictive alternative. And it is on these closely related aspects of review that variations in the scope of review are most easily devised.

Thus, even if Tennessee need not demonstrate a meticulous "precision of regulation," *see United States v. Robel*, 389 U.S. 258, 265 (1967), to justify its voter residence requirements, it should at least be required to show that the waiting period "bears a close relation" to its goals, *see Toomer v. Witsell*, 334 U.S. at 396, or, at the very least, a "reasonable relation," *see Mullaney v. Anderson*, 342 U.S. at 418. In *Mullaney*, for example, Alaska attempted to claim that the higher costs of administering its license requirements against nonresident fishermen justified a fee of $50 for them while residents paid only $5. The District Court had found that "90% of the cost of enforcement was incurred in collecting the fees from non-residents." *Id.* But Justice Frankfurter, while careful to point out that the validity of the tax did not "turn on even approximate mathematical determinations," held that the territory's cost justification for the discrimination imposed was insufficient. This requirement of a "reasonable relation" clearly fell short of the rigorous standard of *Shapiro*. It was, on the other hand, more demanding than the "rational basis" test, under which no more than a conceivable relation between a tax and its purpose would be required.

The same sorts of distinctions are possible in considering alternative means of protecting a valid state interest. Even if Tennessee need not show that there are no "less drastic means" whatever, *Shapiro*, 394 U.S. at 637, it should be required to show at least the absence of "reasonable nondiscriminatory alternatives, adequate to conserve legitimate local interests," *Dean Milk Co. v. City of Madison*, 340 U.S. 349, 354 (1951). If the right to travel is not to receive the same breathing space as First Amendment and other constitutional

values, surely the individual's freedom of movement deserves at least the protection accorded the interstate flow of commodities in *Dean Milk*. *Cf. Edwards v. California*, 314 U.S. 160 (1941).[10]

This suggestion of possible tests less rigorous than *Shapiro* but stricter than the "rational basis" standard is appropriate because durational residency requirements can hope to survive only the latter empty test. Any reasonable examination of their supposed goals shows that lengthy waiting periods are illogical or inessential means to achieve any permissible end. Indeed, as the following section demonstrates, lengthy waiting periods to vote "would seem irrational and unconstitutional" even under the traditional test applicable when no substantive constitutional right is at stake. *Cf. Shapiro*, 394 U.S. at 638.

II. Durational Residence Requirements Are Not Necessary To Achieve any Permissible State Interest

The appellants assert two State interests to justify Tennessee's waiting periods for voting—the need to prevent fraud, and to insure that the voter will be a knowledgeable, involved member of the community. No close exercise of judgment is necessary to reject either one.

A. Voter Registration and Easily Available Techniques To Implement and Enforce Such Procedures Can Prevent Election Frauds; Waiting Periods Offer Little or No Additional Protection.

Each citizen should vote where he resides; the corollary to this is that no voter may cast multiple ballots. The means

[10]For a thorough study of the development and interaction of various constitutional tests of review under the Commerce Clause, the First Amendment and other provisions of the Constitution, see Wormuth & Mirkin, *The Doctrine of the Reasonable Alternative*, 9 Utah L.Rev. 254 (1964).

now all but universally employed to prevent fraudulent evasion of these standards is voter registration. *See, e.g.*, Cocanower & Rich, *Residency Requirements for Voting*, 12 ARIZ. L.REV. 477, 499 (1970); Macleod & Wilberding, *State Voting Residency Requirements and Civil Rights*, GEO. WASH. L.REV. 93, 113 (1969). Indeed, the Tennessee election laws announce the goal of preventing fraud under the caption "Purpose of voter registration system," not as a purpose of the durational residency requirements. TENN. CODE ANN. § 2-301.

A waiting period plays no necessary role in the operation of these registration laws. The fact of residence is most conveniently—and customarily—proved by oath. And a nonresident "can as easily swear that he has been a resident for a certain time, as he could falsely swear that he is presently a resident." *Hall v. Beals*, 396 U.S. 45, 54 (1969) (Marshall, J., dissenting).

States have been able "in other areas, to winnow successfully from the ranks . . . those whose residence in the State is *bona fide*." *Carrington v. Rash*, 380 U.S. 89, 95 (1965). There is as little justification to apply an irrebuttable presumption of nonresidence to citizens present less than a year as to the servicemen involved in *Carrington*. This is particularly true since, unlike such problems as marital proceedings, there is scant reason to fear that individuals will seriously attempt to sham residence to vote. *Cf. Vanderbilt v. Vanderbilt*, 354 U.S. 416 (1957); *Sherrer v. Sherrer*, 334 U.S. 343 (1948).

Criminal proceedings and administrative challenges are, moreover, more than adequate to detect and deter whatever fraud may be feared. *See Harman v. Forssenius*, 380 U.S. 528, 543 (1965) (poll tax or six-month residency certificate in lieu thereof invalid in light of "numerous devices to enforce residency requirements"); *cf. Schneider v. New Jersey*, 308 U.S. 147, 164 (1939) (fear of fraudulent solicitations cannot justify permit requirement since "frauds may be denounced as offenses and punished by law"); *Castle v. Hayes Freight*

Lines, Inc., 348 U.S. 61, 64 (1954) (availability of "conventional forms of punishment" bars states from excluding interstate carrier from highways for weight violation). The Uniform Voting by New Residents in Presidential Elections Act, 9C U.L.A. 198-207 (1967 Supp.), provided a comprehensive range of such enforcement devices. Section 202 of the Voting Rights Act Amendments of 1970, 84 Stat. 314, which this Court sustained in *Oregon v. Mitchell*, 400 U.S. 112 (1970), similarly provides criminal penalties for false registration.

Administrative devices are as adequate to prevent dual voting as to enforce the basic requirement of bona fide residence. State voting officials may cross-check lists of new registrants with their former jurisdictions. The administrative burden is slight. *See* Note, *Residence Requirements for Voting in Presidential Elections*, 37 U. CHI. L.REV. 359, 364 & n.34, 374; *cf. Shapiro*, 394 U.S. at 637. Waiting periods, of course, do nothing of their own force to prevent dual voting—new registrants may as easily attempt to vote in their old jurisdictions as to swear falsely to a year's residence in the new.

Nor can it be argued that a lengthy waiting period is necessary to carry out the registration procedures necessary to confirm the bona fides of residence and prevent dual voting. Even before passage of the Voting Rights Act Amendments of 1970, fully four-fifths of the States allowed at least some citizens to register up to 30 days or less before a presidential election. *See* 116 Cong. Rec. 3543 (daily ed. March 11, 1970). In sustaining Section 202 of the Act, the Court found "no explanation why the 30-day period between the closing of new registrations and the date of election would not provide, in light of modern communications, adequate time to insure against . . . frauds." *Oregon v. Mitchell*, 400 U.S. 112, 239 (opinion of Brennan, J.).

Indeed, Tennessee allows registration up to 30 days before a general or primary election. TENN. CODE ANN. § 2-304. The court below found:

> "This reflects the judgment of the Tennessee Legislature that thirty days is an adequate period in which Tennessee's election officials can effect whatever measures may be necessary, in each particular use confronting them, to insure purity of the ballot and prevent dual registration and dual voting."

Appendix at pp. 48-49.

This reasoning is unassailable. This Court accordingly can hold, without second-guessing State legislatures in the slightest, that insofar as the prevention of fraud provides the basis for durational residency requirements, the waiting period can extend no further than the closing date for registration. And in light of the Congressional findings underlying Section 202 of the Voting Rights Act Amendments and the prevalence of registration closing dates of 30 days or less, it is plain that the needs of carrying out registration procedures can justify no longer period than 30 days.

B. Waiting Periods Serve Either an Impermissible or an Unnecessary Purpose in Insuring the Voter's Involvement in the Community.

The appellants also claim that durational residence requirements are necessary to insure that new settlers in Tennessee will become true members of the community before voting in local elections. This justification requires dissection. It may mean that new citizens should live long enough in the state to absorb local values. It may, on the other hand, mean no more than that the new voter should be familiar with local issues and the candidates.

The first possibility deserves summary rejection. Even if States normally have plenary power to regulate their franchise without special scrutiny under the Equal Protection Clause—which this brief has assumed *arguendo* in order to focus on the right to travel—they still may not "fence out" citizens from the franchise because of the way they would vote. *Carrington v. Rash*, 380 U.S. 89, 94 (1965); *see also Evans v. Cornman*, 398 U.S. 419, 422-23 (1970).

The second possibility requires more study. States may lawfully set nondiscriminatory requirements to insure that voters will exercise the franchise with some knowledge of the issues. *See, e.g., Lassiter v. Northampton County Bd. of Elections,* 360 U.S. 45 (1959). But does a voter require a full year, or even three months, to become familiar with the candidates and the issues? The facts of modern day politics make the answer clearly no.

Candidates are commonly not nominated until a few months before the general election. More important, running for office today is primarily a war waged through the media. The vast majority of voters choose their candidate from what they see or hear on television or radio, or from what they read in newspapers, rather than from personal exposure to the candidates. This is not an unmixed blessing; it is an undeniable phenomenon.

Equally undeniably, advertising and news coverage reach and sustain a fever pitch only during the month before an election. Because this is so, a new resident can acquire all the knowledge he wants or needs during that period. Harder questions, such as whether a week would suffice, need not be faced, since the registration process may properly require residency for the 30-day period set by Tennessee law.

District courts which have noted this possible state interest have recognized these realities of modern political campaigns, as have the commentators. *See, e.g., Affeldt v. Whitcomb,* 319 F. Supp. 69, 77 (N.D. Ind. 1970), *appeal filed,* 39 U.S.L.W. 3334 (December 10, 1970); Cocanower & Rich, *Residence Requirements for Voting,* 12 ARIZ. L. REV. 477, 498 (1971); Note *supra,* 37 U. CHI. L. REV. at 376 (1970). Their observations have understandably not been buttressed by reference to specific data. For although the truth is obvious, its documentation is difficult.

The scant data available, however, do confirm the obvious. In 1968 the Citizens' Research Foundation commissioned a firm specializing in measuring newspaper advertising linage to survey expenditures by all candidates in 361 newspapers

in 139 of the largest cities between July 1 and November 5, election day. The results show that 72.5% of all advertising occurred during October and November—and, surprisingly, more than half of that occurred in the first few days of November.[11]

Some of this advertising during July and August related to primaries and conventions. If total spending is deflated by the best estimate possible for this spending, the October-November concentration ratio—now limited to advertising in the general elections—rises from 72.5% to 84.3%.[12]

These figures include expenditures by presidential candidates. The three major candidates concentrated slightly less of their newspaper advertising for the general election in

---

[11] The percentage figure appearing in the text was calculated from the following table prepared from data appearing in H.E. ALEXANDER, FINANCING THE 1968 ELECTION 106-113 (Citizens Research Foundation 1969).

NEWSPAPER ADVERTISING IN SELECTED METROPOLITAN PAPERS, 1968 ELECTION

	All Candidates (000$)	Three Major Presidential Candidates (000$)	Non-Presidential Candidates (000$)
July	1,239.1	a	1,239.0
August	767.3	52.9	714.4
September	1,183.7	484.4	699.3
October	3,550.7	985.3	2,565.4
November	4,874.9	1,286.1	3,588.8
Total	11,615.7	2,808.7	8,807.0

[a] Data for Presidential candidates include only advertising for the general elections after the party conventions; consequently, there is no figure for July.

[12] "To isolate general election spending, the total spent in July . . . and the total spent by the Democrats in August before the Chicago convention would not apply and must be subtracted from the $11.6 million [appearing as the total to the first column in the table in note 11 *supra*], which gives a total of $10 million." *Id.* at 112. The October-November concentration ratio for general election advertising was then calculated on this deflated base figure.

October and November, the concentration ratio for their spending is 80.9%.[13]

If expenditures by the presidential candidates are subtracted from expenditures by all candidates, expenditures by non-presidential candidates can be calculated. The October-November concentration ratio for these expenditures in state and local elections—the most significant figure for purposes of this case—is 85.4%.[14]

Data for radio-TV advertising are all but impossible to locate. It can be calculated, however, from data collected by a survey firm, that in 1968 the major three presidential candidates concentrated about 76.9% of their total network TV purchases for the general elections within the October-early November period.[15] If we consider only expenditures

[13] Calculated from Column 2 of the table in note 11 *supra*.

[14] Calculated from Column 3 of the table in note 11 *supra*.

[15] The percentage figure appearing in the text was calculated from working papers of the Twentieth Century Fund Commission on Campaign Costs in the Electronic Era, which obtained the underlying data from the survey firm of Leading National Advertisers, Inc., of Norwalk, Connecticut. The final report of the Commission was published under the title VOTERS' TIME (The Twentieth Century Fund 1969). The report did not include the table below; a bar-chart presentation of weekly network expenditures for the Republican and Democratic nominees showing the high concentration of spending in the month before the election does appear as Figure 5 in the report, *id.* at 8.

TELEVISION NETWORK PURCHASES
BY MAJOR PRESIDENTIAL CANDIDATES,
1968 ELECTION

	Total	Programs[a]	Participations[a]
	(000$)	(000$)	(000$)
July	41.6	41.6	.0
August	860.7	294.7	566.0
September	821.8	286.7	535.1
October	3670.7	1596.8	2073.9
November	2081.9	1795.9	286.0
Total	7476.7	4015.7	3461.0

[a] Programs are defined as advertisements or network appearances five or more minutes in length; participations, as shorter advertisements or appearances.

for programs of five minutes or more—the sort of substantial appearances likely to inform voters in some depth about the candidate and his stand on the issues—the October-November concentration ratio rises to 84.5%.[16] Assuming that state and local candidates schedule their radio-TV advertisements in approximately the same fashion as presidential candidates do their network TV advertisements—and there is no reason to suspect the contrary—it would seem that advertising over the airways is even slightly more concentrated in the October-November period than newspaper advertising.

These limited data perhaps could not establish an otherwise questionable point. They are more than sufficient, however, to support the already-obvious conclusion that voter education largely occurs during the month before an election, and consequently that no longer residency requirement can be justified to assure knowledgeable exercise of the franchise.

Finally, the inadequacy of this asserted justification is shown by the widespread provisions for absentee ballots, which both civilians and servicemen may cast in 47 states, including Tennessee. *See* 116 Cong. Rec. S. 3543 (daily ed. March 11, 1970); 115 Cong. Rec. 4862-88 (February 28, 1969) (citing laws of all states). A resident absent from the jurisdiction during the months before an election can hardly be as knowledgeable of the candidates and issues as a new resident present for a month or more. A jurisdiction which permits absentee voting should not be heard to argue that lengthy residence requirements are necessary to insure intelligent exercise of the franchise.

---

[16] Calculated from Column 2 of the table in note 15, *supra*.

CONCLUSION

For the foregoing reasons, the judgment of the District Court should be affirmed.

Respectfully submitted,

May 7, 1971

HENRY P. SAILER
WILLIAM D. IVERSON
888 Sixteenth Street, N.W.
Washington, D.C. 20006
Attorneys for Amicus Curiae

Of Counsel
WILLIAM A. DOBROVIR
1025 Connecticut Avenue
Washington, D.C. 20006